



# STATE OF ARKANSAS

Office of the Attorney General

May 19, 1997

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MAY 22 1997

FOC 1111-1100

The Honorable William F. Caton, Secretary  
Federal Communications Commission  
1919 M. Street, N.W.  
Washington, D.C. 20554

RE: In the Matter of )  
 )  
 American Communications Services, Inc.'s )  
 Petition for Expedited Declaratory Ruling ) CC Docket No. 97-100  
 Preempting Arkansas Public Service Commission )  
 Pursuant to Section 252(e)(5) of the )  
 Communications Act of 1934, as amended )

Dear Mr. Caton:

I enclose for filing the original and twelve (12) copies of the Reply Comments of the Arkansas Attorney General in the above-captioned matter.

I enclose an extra copy which I request be marked "Filed" and returned to the Arkansas Attorney General's Office in the enclosed, self-addressed, postage prepaid envelope. Thank you for your assistance and cooperation in the handling of this matter.

WINSTON BRYANT  
Attorney General

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The Honorable William F. Caton, Secretary  
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Before the  
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Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

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Reply Comments of the Arkansas Attorney General

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## I. Introduction

American Communications Services, Inc. (ACSI) has filed a petition for a declaratory ruling asking the Commission to preempt the authority of the Arkansas Public Service Commission (Arkansas PSC) to arbitrate and approve interconnection agreements and to determine whether competitive local exchange carriers (CLECs) qualify to receive universal service funds. ACSI claims that the Arkansas Telecommunications Regulatory Reform Act of 1997 (Act 77) prohibits the Arkansas PSC from adequately performing these functions and thus the Commission should perform them. In its initial Comments, the Attorney General explained that ACSI's request for preemption is not warranted because ACSI lacks standing, its claims are not ripe, and it failed to demonstrate that the statutory requirements for preemption pursuant to §§ 252(e)(5) and 253(d) of the Telecommunications Act of 1996 (1996 Act) have been satisfied.

Other commenters, including Aliant Communications Company, the Arkansas Telephone Association (ATA), Southwestern Bell Telephone Company (SWBT), and Northern Arkansas Telephone Company, also submitted comments in opposition to ACSI's petition for a declaratory ruling. Both the ATA<sup>1</sup> and SWBT<sup>2</sup> agree with the Attorney General that ACSI's petition should be denied because it has not demonstrated that it has been injured by any action or inaction by the Arkansas PSC pursuant to Act 77. Other commenters, however, support ACSI's petition, at least to the extent of arguing that the Commission should preempt specific provisions of Act 77. These Reply Comments will address the most prevalent criticisms of Act 77 made by the supporting commenters and explain why their arguments should also be rejected, primarily because their claims do not demonstrate that there are issues ripe for Commission decision.

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<sup>1</sup>Comments of the Arkansas Telephone Association, at 7.

<sup>2</sup>Comments of Southwestern Bell Telephone, at 14-15.

## II. Discussion

### A. There is no basis to preempt § 4 of Act 77.

AT&T, the Association for Local Telecommunications Services (ALTS), and the Telecommunications Resellers Association (TRA) challenge the validity of § 4(e)(4) of Act 77. Subparagraphs (A) and (D) of § 4(e)(4) direct the Arkansas PSC to allow incumbent local exchange carriers (ILECs), which have experienced a decrease in federal universal service fund revenues as a result of a Commission order pursuant to § 254(a)(2) of the 1996 Act or a reduction in revenues from the intrastate carrier common line pool, either to increase their rates for basic local exchange service or to increase the ILECs' recovery from the Arkansas Universal Service Fund (AUSF). Subparagraph (B) of § 4(e)(4) allows rural telephone companies, excluding Tier One Companies, to recover, through modifications to their rates for basic local exchange service or through increased revenues from the AUSF, any reduction in intrastate or interstate switched access services revenues or in the net revenue received from various pools as a result of federal or state directives. The supporting commenters claim that these provisions "unduly tilt the proverbial 'playing field' in favor of incumbent providers."<sup>3</sup>

These criticisms are, at a minimum, premature. Section 253(b) of the 1996 Act provides that a state may impose, on a competitively neutral basis and consistent with the principles enunciated in § 254 of the 1996 Act, requirements "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Although the Commission has now

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<sup>3</sup>Comments of the Telecommunications Resellers Association, at 16.

issued a comprehensive order designed to implement the Federal Universal Service Fund,<sup>4</sup> the Arkansas PSC has not yet issued its regulations implementing the AUSF and probably will not do so any earlier than ninety days after the Commission's issuance of the Federal Universal Service Order.<sup>5</sup> Therefore, a valid claim cannot currently be made that the AUSF will be administered in a manner that is not competitively neutral. Indeed, in light of the overriding and clear legislative directives in §§ 2(1) and 16(III) of Act 77, which require that Arkansas' telecommunications laws and regulations be "consistent with and complementary to" the 1996 Act, the Commission should not assume that the Arkansas PSC will administer the AUSF in a manner that is not competitively neutral and that is disadvantageous to CLECs.

In addition, in order to comply with § 4(e)(4) of Act 77, the Arkansas PSC is not obligated to increase the level of revenues that ILECs are entitled to receive from the AUSF. Subparagraphs (A), (B), and (D) of § 4(e)(4) authorize the Arkansas PSC to allow ILECs to increase their rates for basic local exchange service in lieu of increasing the revenues they would otherwise receive from the AUSF. This approach would not only pass legal muster under the Commission's competitive neutrality standard, but also would appear to aid, not disadvantage, the competitive posture of CLECs because ILECs' rate increases would no doubt make their competitors' rates more attractive to consumers. Allowing ILECs to increase their rates for basic local exchange service also would avoid any possible conflict between § 4(e)(4) and the requirements of § 254(e) of the 1996 Act that "such support shall [be] use[d] only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."

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<sup>4</sup>See generally In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (1997)(hereinafter "Federal Universal Service Order").

<sup>5</sup>1997 Ark. Acts 77, § 4(e).

Consequently, the supporting commenters are wrong when they imply that implementation of the AUSF would unfairly tilt the playing field in favor of ILECs.

B. There is no basis for preemption of § 5 of Act 77.

AT&T, ALTS and TRA also challenge the validity of § 5(b) of Act 77. ALTS and TRA challenge § 5(b)(1) of Act 77, which requires a telecommunications provider seeking designation as an eligible telecommunications carrier for purposes of the AUSF “to provide service to all customers in an incumbent local exchange carrier’s local exchange area using its own facilities or a combination of its own facilities and resale of another carrier’s services.” In its Comments, ALTS argues that § 5(b)(1) “requires the service area for which a carrier is an eligible carrier to be the same as the service area of the incumbent.”<sup>6</sup> TRA contends that § 5(b)(1) “preclud[es] a competitive LEC from receiving State-driven universal service support unless it has effectively replicated the incumbent LEC’s network[.]”<sup>7</sup> These arguments do not require preemption of § 5(b) of Act 77.

Subsections 214(e)(2) and 214(e)(5) of the 1996 Act require state commissions to designate the area throughout which a non-rural carrier must provide universal service in order to be eligible to receive universal service support.<sup>8</sup> As noted in the Federal Universal Service Order, states are expected to exercise their authority in the area of the state universal service fund in a manner that promotes the pro-competitive goals of the 1996 Act as well as the universal service principles of § 254 of the 1996 Act.<sup>9</sup> The Arkansas PSC has not yet issued its regula-

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<sup>6</sup>Comments of the Association for Local Telecommunications Services, at 7.

<sup>7</sup>Comments of the Telecommunications Resellers Association, at 15.

<sup>8</sup>See also Federal Universal Service Order, at ¶ 183.

<sup>9</sup>Id.

tions implementing the AUSF. Therefore, no factual basis exists for assuming that the Arkansas PSC will promulgate regulations interpreting § 5(b)(1) in a manner inconsistent with either § 214(e) of the 1996 Act or the Federal Universal Service Order.

In any event, designation of service areas which are equivalent to an incumbent's local exchange area does not constitute a per se violation of either the 1996 Act or the Federal Universal Service Order. In the Federal Universal Service Order, the Commission admittedly encouraged states not to adopt service areas which are "simply structured to fit the contours of an incumbent's facilities[ ]" because new entrants might have difficulty conforming their service areas to the same area.<sup>10</sup> Without any allegations or evidence that such a requirement would be difficult for new entrants to comply with in Arkansas, however, it would be premature for the Commission to conclude that Act 77's designation of service areas violates either the 1996 Act or the Federal Universal Service Order.

ALTS also contests the validity of § 5(b)(1) of Act 77 to the extent that it prevents a telecommunications provider from receiving high-cost support before "the telecommunications provider has facilities in place and offers to serve all customers in its service area." Specifically, ALTS contends that there is no such restriction in the 1996 Act.<sup>11</sup> The Federal Universal Service Order provides, however, that pure resellers are not eligible to receive universal service support and that eligible telecommunications carriers must offer the supported services to all customers in their service areas.<sup>12</sup> Therefore, so long as the Arkansas PSC uses a definition of facilities

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<sup>10</sup>Id., at ¶ 184.

<sup>11</sup>Comments of the Association for Local Telecommunications Services, at 7-8.

<sup>12</sup>Federal Universal Service Order, at ¶¶ 177, 140, 142.

consistent with the 1996 Act and the Federal Universal Service Order, there should be no conflict between § 5(b)(1) of Act 77 and § 214(e) of the 1996 Act.

In addition, the Federal Universal Service Order provides that a carrier that is currently unable to provide single-party service, access to enhanced 911 service, or toll limitation services may petition the state commission to receive universal service support for a designated period of time until the carrier has completed the network upgrades necessary to offer these services.<sup>13</sup> Allowing similar waivers would be an appropriate issue for the Arkansas PSC to consider when promulgating regulations implementing the AUSF. Such waivers would ameliorate any potential inappropriate consequence of § 5(b)(1).

AT&T<sup>14</sup> and ALTS<sup>15</sup> also seek preemption of § 5(b)(2) of Act 77 which provides that an eligible carrier may receive funding only for the portion of its facilities that it owns and maintains. ALTS claims, for example, that such a restriction conflicts with § 214(e)(1)(A) of the 1996 Act, which provides that a carrier is eligible for universal service funding “using its own facilities or a combination of its own facilities and resale of another carrier’s services[.]”<sup>16</sup> AT&T, in turn, claims that such a restriction precludes it from receiving universal service funds for unbundled network elements that it bears the costs of maintaining.<sup>17</sup> Neither has demonstrated, however, that an actual inconsistency between the 1996 Act and the application of § 5(b)(2) exists. In the Federal Universal Service Order, the Commission held that “own

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<sup>13</sup>Id., at ¶¶ 90, 133 n.318.

<sup>14</sup>AT&T Comments, at 4-5.

<sup>15</sup>Comments of the Association for Local Telecommunications Services, at 8.

<sup>16</sup>Id.

<sup>17</sup>AT&T Comments, at 5.

facilities” for purposes of § 214(e)(1)(A) includes facilities obtained as unbundled network elements.<sup>18</sup> There is no reason to believe that the Arkansas PSC cannot and will not construe § 5(b)(2) of Act 77 consistent with these principles and conclude that a carrier “owns and maintains” unbundled network elements it has obtained. Until the Arkansas PSC adopts a contrary construction, preemption of § 5(b)(2) is not warranted.

And finally, complaints that § 5(b)(5)’s requirement that designation as an eligible telecommunications carrier must be in the public interest violates the 1996 Act are also unfounded.<sup>19</sup> Section 214(e)(2) explicitly authorizes state commissions to designate additional eligible telecommunications carriers for federal universal service support “consistent with the public interest[.]” Even if § 214(e)(2) did not authorize such a “public interest” criterion for federal universal service support, however, Arkansas is free to impose such a requirement for its own state universal service support. Both the 1996 Act and the Federal Universal Service Order allow states to adopt their own criteria for determining what carriers will be eligible for their states’ universal service funding, as long as the criteria do not rely on or burden federal universal service support mechanisms.<sup>20</sup> No supporting commenter has explained how requiring the designation of an eligible telecommunications carrier to be in the public interest would rely on or burden federal universal service support mechanisms. In sum, the supporting commenters have offered no valid reason to preempt § 5 of Act 77.

C. There is no basis to preempt § 9 of Act 77.

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<sup>18</sup>Federal Universal Service Order, at ¶¶ 154-59.

<sup>19</sup>Comments of Sprint Communications Company, L.P., at 11; Comments of the Telecommunications Resellers Association, at 15.

<sup>20</sup>47 U.S.C. § 254(f); Federal Universal Service Order, at ¶ 135.

Sprint and TRA urge the Commission to preempt several subsections of § 9 of Act 77. Sprint specifically challenges subsections 9(d), (f), and (g) of Act 77.<sup>21</sup> In a broader sweep, TRA requests the Commission to preempt subsections 9(d) through 9(j).<sup>22</sup> In summarizing its position, Sprint contends that Act 77 “so hobbles the ability of the A[rkansas]PSC to carry out the functions envisioned by Congress and the Commission in the Telecommunications Act of 1996 and the regulations issued in response to same as to render the A[rkansas]PSC virtually impotent.”<sup>23</sup> As a result of its belief that “multiple provisions” of Act 77 conflict on their face with federal law, Sprint claims that Act 77 “handily fulfills the third test for preemption by conflicting with the Commission’s Rules or by standing as an obstacle to the scheme intended by Congress.”<sup>24</sup>

At the outset, it should be noted that a number of specific provisions of Act 77 challenged by Sprint and TRA as conflicting with the 1996 Act and the Commission’s First Report and Order implementing the Act<sup>25</sup> contain language ensuring that Act 77 is applied by the Arkansas PSC consistently and in conformance with the 1996 Act. This language appears, for example, in subsections 9(d), 9(f), and 9(g). Given this specific statutory language, there is no basis to assume that the Arkansas PSC will interpret and apply the provisions of § 9 of Act 77 in a manner inconsistent with the 1996 Act.

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<sup>21</sup>Comments of Sprint Communications Company, L.P., at 4-7.

<sup>22</sup>See, e.g., Comments of the Telecommunications Resellers Association, at 14.

<sup>23</sup>Comments of Sprint Communications Company, L.P., at 3.

<sup>24</sup>Id.

<sup>25</sup>See generally In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (1996)(hereinafter “Local Competition Order”).

Beyond these general considerations, the specific concerns expressed by Sprint and TRA are unfounded. Sprint, for example, is concerned that the Arkansas PSC will apply subsections 9(d) and 9(g) regarding resale restrictions in a manner that violates the mandates of federal law. There is no factual basis for Sprint's concerns. In the most significant arbitration to be decided by the Arkansas PSC since the passage of Act 77, the Arkansas PSC ruled that § 251(c)(4)(A) of the 1996 Act obligated SWBT to offer for resale at wholesale rates any telecommunications service that it provides at retail to subscribers who are not telecommunications carriers.<sup>26</sup> In addition, the Arkansas PSC adopted AT&T's last best offer regarding the resale restrictions that SWBT could apply.<sup>27</sup> In essence, the Arkansas PSC ruled that, with the exception of cross-class restrictions that AT&T apparently did not challenge,<sup>28</sup> all other resale restrictions were presumptively unreasonable. The Arkansas PSC's decision on resale restrictions is thus consistent with the Local Competition Order.<sup>29</sup> Sprint's concerns regarding the Arkansas PSC's application of subsections 9(d) and 9(g) of Act 77 are not justified.

Sprint also complains that subsection 9(f) of Act 77 might be applied by the Arkansas PSC to restrict interconnection only to CLECs providing competitive telephone exchange traffic

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<sup>26</sup>In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996, Docket No. 96-395-U, Order No. 5, at 7.

<sup>27</sup>Id., Order No. 5, at 9-11.

<sup>28</sup>Id., Order No. 5, at 9-10.

<sup>29</sup>Local Competition Order, at ¶¶ 939, 962; see also 47 C.F.R. § 51.613(a)(1)(allowing incumbents to restrict resale of residential services to classes of customers not eligible for such services).

and not to CLECs wishing to provide competitive exchange access traffic.<sup>30</sup> Sprint states that such an interpretation would violate paragraphs 184 and 185 of the Local Competition Order. It is not clear that the statutory language about which Sprint complains – “for the purpose of the CLEC competing with the incumbent local exchange carrier in the provision of telecommunications services to end-user customers[ ]” – was intended to restrict interconnection to CLECs transmitting and routing telephone exchange traffic, as opposed to those carriers wishing to provide competitive exchange access service. Nonetheless, subsection 9(f) also contains language ensuring that its application by the Arkansas PSC will be consistent with federal law. Therefore, at the very least, it is premature for Sprint to suggest that the Commission should preempt subsection 9(f) of Act 77 until it is clear that the Arkansas PSC refuses to arbitrate or approve interconnection agreements concerning exchange access service.

### III. Conclusion

Neither ACSI nor its supporting commenters have provided the Commission with any valid reasons to usurp Arkansas’ ability to play a role in the development of intrastate telecommunications competition. The Attorney General therefore respectfully requests that ACSI’s petition for a declaratory ruling be denied in all respects.

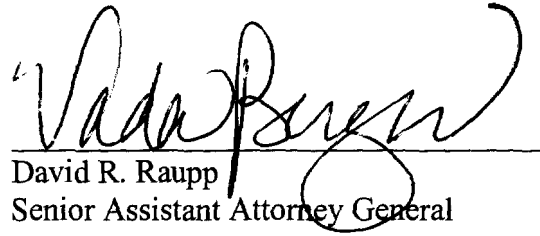
Respectfully submitted,

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<sup>30</sup>Comments of Sprint Communications Company, L.P., at 7.

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